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No. 87-2127

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL., APPELLANTS

v.

STEVEN GARFINKEL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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QUESTIONS PRESENTED

Section 630 of the Treasury, Postal Service and General Appropriations Act for fiscal year 1988 provides that no funds appropriated for that year may be expended for the implementation or enforcement of any policy, form or agreement concerning the unauthorized disclosure of classified information if the policy, form or agreement: (a) contains the term "classifiable" or concerns information other than that which is marked classified or is known by the employee to be classified or to be in the process of a classification determination, or (b) obstructs (by requirement of prior authorization or limitation of disclosure) the right of an individual to petition or communicate with Members of Congress in a secure manner as provided by the procedures of Congress or interferes with the right of Congress to obtain Executive Branch information. Consistent with the first of these requirements, appellees have deleted the word "classifiable" from all forms.

The questions presented are:

1. Whether the remaining requirements of Section 630 unconstitutionally interfere with the President's authority as Commander in Chief and head of the Executive Branch to protect national security information and to supervise employees who have responsibilities in the area of national security.

2. Whether appellants' remaining claims under Section 630 are ripe for judicial review and suitable for the award of equitable relief.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

OPINIONS BELOW

The opinion of the district court dated May 27, 1988 (J.S. App. 1a-36a) is reported at 688 F. Supp. 671. The opinion and judgment of the district court in the companion cases of *NFFE* v. *United States* and *AFGE* v. *Garfinkel,* dated July 29, 1988 (Mot. to Aff. App. 4a-24a; J.A. 61-63), and the order of the district court on the defendants' motion to alter or amend the judgment in those cases (J.A. 64-65), are reported at 695 F. Supp. 1196.

JURISDICTION

The judgment of the district court (J.S. App. 37a-38a) was entered on May 27, 1988. The notice of appeal to this Court was filed on June 3, 1988 (J.S. App. 39a-40a), and the jurisdictional statement was docketed on June 28, 1988. The Court noted probable jurisdiction on October 31, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution and Section 630 of the Treasury, Postal Service and General Government Appropriations Act, 1988 (as enacted by Section 101(m) of the Continuing Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-432) are reproduced at App., *infra*, 1a-3a. Section 619 of the Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1756, which is identical to Section 630 of the 1988 Act, is set forth in the addendum to the appellants' brief.

STATEMENT

A. The Legal Framework For The Protection Of National Security Information In The Executive Branch

1. The President has the authority and responsibility under Article II of the Constitution to classify information concerning the national defense and foreign relations of the United States, to decide whether an individual is sufficiently trustworthy to be granted access to such information, and to determine whether an individual has a need to know a particular item of such information on a particular occasion. This authority "exists quite apart from any explicit congressional grant." *Department of the Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988), slip op. 8.

The Executive Branch has engaged in systematic efforts since World War I to protect national security information. Since World War II, these efforts have been formalized in a series of executive orders that seek to ensure uniformity and proper classification throughout the Executive Branch. See Exec. Order No. 10,290, 3 C.F.R. 789 (1949-1953 Comp.); Exec. Order No. 10,501, 3 C.F.R. 979 (1949-1953 Comp.); Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975 Comp.); Exec. Order No. 12,065, 3 C.F.R. 190 (1978 Comp.). The most recent such directive, Executive Order No. 12,356, was issued by President Reagan in 1982. 47 Fed. Reg. 14,874, 3 C.F.R. 166 (1982 Comp.); 50 U.S.C. 401 note. See *Egan*, slip op. 9.

Executive Order No. 12,356 provides for three levels of classification – Top Secret, Secret and Confidential – based upon the degree of the harm to the national security that could result

from unauthorized disclosure (§ 1.1(a)).[1] The Executive Order also describes categories of information that may be classified[2] and prohibits classification to conceal violations of the law or administrative inefficiency or to prevent embarrassment (§ 1.6(a) and (b)). If there is reasonable doubt about the need to classify information, it must be safeguarded as if it is classified pending a classification determination, which must be made within 30 days (§§ 1.1(c), 1.2(e)). When classified information exists in a document or other concrete format, markings are ordinarily used to indicate its classified status (§ 1.5).[3]

In order to safeguard national security information, Executive Order No. 12,356 provides that access must be limited as a general matter to those individuals who have been determined to be trustworthy, and that access to any particular item of information may be granted only where it "is essential to the accomplishment of lawful and authorized Government purposes" (§ 4.1(a))—*i.e.*, where the individual has a "need to know" that information. Each agency is required to establish controls to ensure that classified information is used, stored, reproduced,

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[1] The designations Top Secret, Secret, and Confidential apply to information whose unauthorized disclosure could be expected to cause, respectively, "exceptionally grave damage," "serious damage," and "damage" to the national security (§§ 1.1(a)(1)-(3)).

[2] Section 1.3(a) provides that information shall be considered for classification if it concerns (1) "military plans, weapons, or operations;" (2) "the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;" (3) "foreign government information;" (4) "intelligence activities (including special activities), or intelligence sources or methods;" (5) "foreign relations or foreign activities of the United States;" (6) scientific, technological, or economic matters relating to the national security;" (7) "programs for safeguarding nuclear materials or facilities;" (8) "cryptology;" and (9) "a confidential source."

[3] Not all classified information is marked. Raw intelligence or an agent's report may not bear classification markings until it is processed, and an employee's or former employee's manuscript that contains classified information would not bear classification markings until it is reviewed pursuant to a prepublication agreement; in each case, however, the information is classified. See *Prepublication Review and Secrecy Agreements: Hearings Before the Subcomm. on Oversight of the House Permanent Select Comm. on Intelligence*, 96th Cong., 2d Sess. 39-41 (1980).

transmitted and destroyed under conditions that will provide adequate protection and prevent unauthorized access (§ 4.1(b)). Dissemination outside the Executive Branch is prohibited except "under conditions that ensure that the information will be given protection equivalent to that afforded within the executive branch" (§ 4.1(c)). All persons who are granted access to classified information are subject to appropriate sanctions if they "knowingly, willfully, or negligently" disclose it to unauthorized persons (§ 5.4(b)(1)). In the case of government officers and employees, those sanctions may include reprimand, loss or denial of access to classified information, suspension without pay, and removal from employment (§ 5.4(c)).

The National Security Council is responsible for establishing overall policy with respect to classified information, but the Director of the Information Security Oversight Office (ISOO) in the General Services Administration is responsible for implementing the program and monitoring compliance (§ 5.1). The Director of ISOO is authorized, *inter alia*, "to prescribe, after consultation with affected agencies, standard forms that will promote the implementation of the information security program" (§ 5.2(b)(7)). See also 32 C.F.R. Pts. 2001-2003.

2. In addition to the foregoing measures instituted by the President pursuant to his inherent constitutional authority, the National Security Act of 1947, ch. 343, 61 Stat. 495, provides that the Director of Central Intelligence (DCI) "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure" (§ 102(d)(3), 50 U.S.C. 403(d)(3)). See *Webster* v. *Doe*, No. 86-1294 (June 15, 1988), slip op. 7-8; *CIA* v. *Sims*, 471 U.S. 159, 170-173 (1985); *Snepp* v. *United States*, 444 U.S. 507, 509 (1980).[4] The DCI has long required individuals who are granted access to information concerning the Central Intelligence Agency (CIA) or its intelligence sources and methods to sign a formal agreement in which they promise not

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[4] The National Security Act merely restates the broad authority previously granted to the DCI by the President pursuant to his inherent constitutional authority. Presidential Directive of Jan. 22, 1946, 3 C.F.R. 1080 (1943-1948 Comp.); see *CIA* v. *Sims*, 471 U.S. at 172-173.

to disclose such information without prior authorization and to submit any material relating to such information for prepublication review. In *Snepp*, the Court found one such agreement to be an "entirely appropriate" exercise of the DCI's authority to protect intelligence sources and methods, and it sustained the agreement against a First Amendment challenge (444 U.S. at 509 n.3).

In 1981, the DCI adopted Standard Form (SF) 4193 (J.A. 19-25), which governs access to Sensitive Compartmented Information (SCI) (J.S. App. 5a n.4). SCI is a subset of information involving intelligence sources and methods that consists of "data about sophisticated technical systems for collecting intelligence and the information collected by those systems." DCI Security Committee, *Sensitive Compartmented Information: Characteristics and Security Requirements* 1 (June 1984) (J.A. 46). Because SCI is extremely vulnerable to countermeasures and compromise, "no risk is tolerable where SCI is involved" (J.A. 49). More stringent standards are accordingly applied in determining who may have access to SCI, and individuals who have been granted access to Top Secret information nonetheless may be denied access to SCI (J.A. 48-51). In a declaration filed in the court below, DCI William Webster explained that Form 4193 serves to underscore the personal obligation undertaken by the signatory, which prevents both inadvertent and deliberate disclosures, and to facilitate the tracking of persons who have had access to the SCI (Webster Decl. ¶¶ 3-4, 8-11 (J.A. 40-41, 43-44)). These special protections for SCI are in accordance with the authorization in Section 4.2 of Executive Order No. 12,356 for the DCI to establish special access programs governing "particularly sensitive" information pertaining to intelligence sources and methods (Webster Decl. ¶ 3 (J.A. 40-41)).

As originally adopted in 1981, Form 4193 described SCI as information that "involves or derives from intelligence sources or methods and is classified or classifiable under the standards of Executive Order 12,065 [the predecessor to Executive Order No. 12,356] or other Executive order or statute" (SF 4193 ¶ 1 (J.A. 19)). Any person who signed Form 4193 acknowledged that "direct or indirect unauthorized disclosure, unauthorized reten-

tion, or negligent handling of SCI * * * could cause irreparable injury to the United States or be used to advantage by a foreign nation" (*id.* ¶ 3 (J.A. 19)). The signatory accordingly promised, in consideration of his being granted access to SCI, never to divulge SCI to anyone who is not authorized to receive it without the prior written authorization of the responsible agency (*id.* ¶¶ 1, 3 (J.A. 19, 20)).[5] Finally, the signatory acknowledged that any breach of the agreement could result in termination of his access to SCI, removal from a position of special confidence and trust requiring such access, or loss of employment with any agency that granted him access to SCI (*id.* ¶ 7 (J.A. 21)).

3. In 1982, in response to numerous improper disclosures, President Reagan established a task force to recommend additional measures for the protection of national security information. The task force's recommendations were approved by the National Security Council and were adopted by the President in National Security Decision Directive (NSDD) 84 (Mar. 11, 1983) (J.A. 11-14). NSDD 84 states that preventing unlawful disclosures of classified information is "a matter of grave concern and high priority," and it directs each Executive Branch agency to require any person who is granted access to classified information to sign a nondisclosure agreement as a condition of such access (¶ 1.a. (J.A. 11)). In addition, NSDD 84 requires the Director of ISOO to establish a standard nondisclosure form for use throughout the Executive Branch for classified information other than SCI (¶ 1.c. (J.A. 12)).

Pursuant to the latter mandate of NSDD 84, the Director of ISOO adopted Standard Form (SF) 189 (J.A. 15-18). As originally adopted in 1983, SF 189 defined the term "classified information" as "information that is either classified or classifiable under the standards of Executive Order 12,356 or under any other Executive Order or statute that prohibits the unauthorized disclosure of information in the interest of national security"

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[5] The signatory also agreed to submit for security review all materials intended for publication that contain or purport to contain SCI or information relating to or derived from SCI (*id.* ¶ 4 (J.A. 20)). The prepublication review provisions of the forms are not at issue here.

(¶ 1 (J.A. 15)). Like the DCI's Form 4193, SF 189 states that the signatory has been advised and is aware that "direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of classified information * * * could cause irreparable injury to the United States or could be used to advantage by a foreign nation." The signatory accordingly promised never to divulge such information unless he has officially verified that the recipient has been properly authorized by the responsible agency (¶ 3 (J.A. 15)). As under Form 4193, the signatory also acknowledged that a breach of the agreement could result in termination of his security clearances, loss of his position of confidence and trust, or loss of employment with the agency that granted him access to the information (¶ 4 (J.A. 16)).

4. On August 17, 1987, the National Federation of Federal Employees filed an action in the United States District Court for the District of Columbia seeking to enjoin the use of SF 189 and any other form that used the word "classifiable" to describe information that may not be disclosed. *NFFE* v. *United States*, Civ. No. 87-2284-OG. NFFE contended, *inter alia*, that use of the term "classifiable" violated the First Amendment because it is ambiguous and overbroad and would permit an agency to classify information after the employee sought to disclose it or had already done so. The American Federation of Government Employees and three individuals filed a similar suit in the same court on September 1, 1987, challenging the term "classifiable" in both SF 189 and Form 4193. *AFGE* v. *Garfinkel*, Civ. No. 87-2412-OG. See J.S. App. 2a n.1.

On December 21, 1987, while the *NFFE* and *AFGE* suits were pending, the Director of ISOO published a regulation in the *Federal Register* to clarify the meaning of the term "classifiable information" as used in SF 189.[6] That regulation stated that the term "classifiable information" means

> (a) Unmarked *classified* information, including oral communications; and (b) *unclassified* information that meets

[6] The Director of ISOO previously had sought to clarify the meaning of the term "classifiable information" in notices published on August 3 and August 11, 1987, before the *NFFE* and *AFGE* suits were filed. See 52 Fed. Reg. 28,802, 29,793 (1987).

> the standards for classification and is in the process of a classification determination. "Classifiable information" does *not* refer to currently unclassified information that may be subject to possible classification at some future date, but is not currently in the process of a classification determination. Therefore, the only circumstances under which a party to SF 189 might violate its terms by disclosing *unclassified* information are when a party knows, or reasonably should know, that such information is in the process of a classification determination * * *.

32 C.F.R 2003.20(h)(1)(i) (emphasis in original), as added, 52 Fed. Reg. 48,367 (1987).

5. One day after the Director of ISOO published the clarification of the term "classifiable," Congress passed the 450-page, government-wide Continuing Appropriations Act for fiscal year 1988, Pub. L. No. 100-202, 101 Stat. 1329. Section 101(m) of that Act contained the Treasury, Postal Service and General Government Appropriations Act, 1988, 101 Stat. 1329-390. Section 630 of the latter Act, 101 Stat. 1329-432 (App., *infra*, 1a-2a), is a rider, added at the last minute (133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987)), which purports to impose certain restrictions on the ability of Executive Branch agencies to protect classified information.

Section 630 provides that no funds appropriated in any Act for fiscal year 1988 "may be used to implement or enforce the agreements in Standard Forms 189 or 4193 of the Government or any other nondisclosure policy, form or agreement" that has certain characteristics identified in five succeeding subsections.[7] The first two of these subsections provide that appropriated funds may not be used to implement or enforce a policy, form or agreement that "contains the term 'classifiable' " (¶ (2)) or that "concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in

[7] Although Section 630 uses the term "Standard Form" to refer to both SF 189 and Form 4193, the latter is actually not a standard form subject to generally applicable requirements; it was issued pursuant to the special authority of the DCI.

the process of a classification determination" (¶ (1)). The latter limitations parallel the categories of information to which SF 189 was limited in any event by virtue of the clarification published by the Director of ISOO on December 21, 1987. See pages 7-8, *supra*. Subsections (3) and (4) of Section 630 prohibit the use of funds for a nondisclosure policy, form or agreement that "obstructs * * * the right of any individual to petition or communicate with Members of Congress" or "interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress." Subsection (5) provides that appropriated funds may not be used for any policy, form or agreement that "imposes any obligations or invokes any remedies inconsistent with statutory law."

6. The responsible Executive Branch officials promptly took steps to accommodate certain of the concerns reflected in Section 630. Appellee Garfinkel, the Director of ISOO, temporarily suspended further implementation of SF 189 pending receipt of advice from the Attorney General (Garfinkel Aff. ¶ 2 (Feb. 8, 1988) (J.A. 28-29)). He also directed agencies to notify affected employees that any SF 189 executed after December 22, 1987 would be treated as voidable at the employee's request (¶ 3 (J.A. 29)).

On behalf of the DCI, Lt. General Edward J. Heinz, the Director of the Intelligence Community Staff, issued instructions stating that Form 4193 was only to be used when accompanied by a special addendum that read:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 100-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

Heinz Decl. ¶ 4 (Feb. 9, 1988) (J.A. 26). Then, on March 18, 1988, the DCI replaced Form 4193 with Form 4355. Second Heinz Decl. ¶ 3 (Mar. 24, 1988) (J.A. 52) & Exh. A (J.A. 54-58). Consistent with subsection (2) of Section 630, Form 4355 does not use the word "classifiable" in describing the infor-

mation to which the signatory's nondisclosure obligation applies. Instead, tracking subsection (1) of Section 630, Form 4355 describes SCI as information that "involves or derives from intelligence sources or methods and is classified or is in the process of a classification determination under the standards of Executive Order 12356 or other Executive order or statute" (¶ 1 (J.A. 54)).[8] A signatory to Form 4355 agrees that he will never divulge anything marked SCI or that he knows to be SCI to anyone not authorized to receive it or without prior authorization, and that it is his responsibility to consult with appropriate officials in order to ensure that he knows whether information that he has reason to believe might be SCI (or might be related to or derived from SCI) is considered by the agency concerned to be SCI (¶ 3 (J.A. 55)). Instructions issued by Lt. Gen. Heinz provide that agencies may permit persons who signed Form 4193 after December 21, 1987, to sign a Form 4355 in its place. Second Heinz Decl., Exh. B.

B. The Proceedings In This Case

1. On February 19, 1988, one month before the DCI issued Form 4355, the American Foreign Service Association (AFSA) and seven Members of Congress, appellants herein, filed this action challenging SF 189 and Form 4193 on the ground that they violate Section 630. Appellants sought declaratory and injunctive relief that would (i) bar the Secretary of State from requiring State Department employees to execute Form 4193 (even with the addendum quoted above) during the remainder of fiscal year 1988, (ii) compel the Secretary of State to treat all Form 4193 agreements signed after December 22, 1987, as void, (iii) direct appellees Webster and Garfinkel to prohibit federal agencies from requiring federal officers and employees to sign Form 4193 during the remainder of fiscal year 1988, and (iv) direct appellees Webster and Garfinkel to require all federal agencies to treat all SF 189 and Form 4193 agreements executed after December 22, 1987, as void and to notify the signatories

[8] The term "classified" in Form 4355 refers to both marked and unmarked classified information.

accordingly. Complaint 7-8 (J.A. 9-10). The district court consolidated this case with the *AFGE* and *NFFE* cases for all purposes (J.S. App. 2a n.1; J.A. 2), and the plaintiffs in *AFGE* and *NFFE* amended their complaints to allege similar claims under Section 630.

2. The district court considered the consolidated cases in two steps. First, in the decision at issue here (J.S. App. 1a-36a), rendered on May 27, 1988, the court addressed the claim presented in all three cases under Section 630. The court did not actually decide whether the challenged forms were inconsistent with Section 630; instead, it assumed for purposes of its decision that appellees had violated Section 630, noting by way of explanation only that the DCI continued to use Form 4193 after December 22, 1987 (albeit with the addendum) until he adopted Form 4355 in March 1988 (J.S. App. 22a-23a n.16).[9] The court nevertheless denied appellants any relief because it held that Section 630 unconstitutionally interferes with the President's inherent Article II power to protect national security information (J.S. App. 22a-27a).[10]

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[9] The DCI interpreted Section 630 not to bar Form 4193 altogether, but only to preclude implementation or enforcement of those features of Form 4193 that may be inconsistent with Subsections (1)-(5) of Section 630.

[10] As a threshold matter, the court held that the appellant Members of Congress lack standing to challenge the form agreements under Section 630 because they can seek relief by participating in the legislative process (J.S. App. 13a-14a). The court found, however, that appellant AFSA and the unions in *NFFE* and *AFGE* have standing to challenge the agreements under Section 630 because they alleged that some of their individual members had been chilled in the exercise of their First Amendment rights as a result of the implementation and threatened enforcement of those agreements (*id.* at 14a-18a; see also *id.* at 20a-22a), and that the three individual plaintiffs in *AFGE* who had signed forms prior to December 22, 1987, also had standing to object to the forms under the subsequently enacted Section 630 (*id.* at 18a-19a). Although appellants listed as a question presented in their Jurisdictional Statement (at i) the question whether the district court had properly denied standing to the individual Members of Congress, they have omitted that issue from the questions presented in their merits brief (at i) and they have not addressed it in the body of either the Jurisdictional Statement or their brief on the merits.

In the district court's view, although Congress is not precluded from "activity relating to national security information" (J.S. App. 23a), Section 630 "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations" (J.S. App. 27a). The court found Subsections (3)-(5) of Section 630 particularly objectionable because those provisions, which govern communications to Congress by federal employees and bar enforcement of agreements that impose obligations or invoke remedies inconsistent with statutory law, would restrict the President to insuring "the secrecy of national security information only by those means authorized by Congress" (J.S. App. 27a). Accordingly, the court concluded, "[w]herever may be drawn the line between the political branches in the area of regulating access to national security information, section 630 surely falls within the territory where it is not welcome" (*ibid.*). The court therefore granted summary judgment in favor of the appellee federal officials in this case, since appellants based their challenge to SF 189 and Form 4193 only on Section 630, and it dismissed the corresponding counts under Section 630 in the *NFFE* and *AFGE* complaints (J.S. App. 27a-28a, 37a-38a).[11]

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[11] The district court also rejected several additional claims advanced only by the plaintiffs in *NFFE* and *AFGE*. First, the court held that the nondisclosure agreements do not violate the whistleblower provision of the Civil Service Reform Act, because that provision excepts from protection any disclosure of information that is " 'specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs' " (J.S. App. 30a-31a, quoting 5 U.S.C. 2302(b)(8)(A)) and because enforcement of the whistleblower provision is in any event committed to the Special Counsel of the Merit Systems Protection Board, rather than a private right of action (J.S. App. 31a, citing 5 U.S.C. 1206(c)(1)(A)). Second, the court rejected as frivolous the claims that the agreements violate an uncodified Code of Ethics for Government Service, Pub. L. No. 96-303, § 3, 94 Stat. 855 (J.S. App. 31a-32a), the Copyright Clause of the Constitution, Art. I, § 8, Cl. 8 (J.S. App. 33a), and the Freedom of Information Act, 5 U.S.C. 552 (J.S. App. 34a). Third, the court dismissed for failure to state a claim the contention that Form 4193 violates NSDD 84 (J.S. App. 32a). Fourth, the court ruled that differences between SF 189 and a form used for government-contractor employees are rational (J.S. App. 28a-30a).

C. Subsequent Developments

1. On July 29, 1988, after the notice of direct appeal to this Court was filed in the instant case, the district court rendered its final decision in *NFFE* and *AFGE*, holding that the term "classifiable" as used in SF 189 and Form 4193 is not impermissibly vague under the First Amendment provided its scope is clarified in accordance with the definition published by the Director of ISOO on December 21, 1987 (Mot. to Aff. App. 10a-20a). However, the court ordered that SF 189 and Form 4193 could not be enforced with respect to "classifiable" information unless employees who had signed those forms were individually informed of the published clarification or the term was deleted from their agreements (*id.* at 20a).

The district court also rejected the contention by the *NFFE* and *AFGE* plaintiffs that the regulation published by the Director of ISOO in December 1987 violates the First Amendment because it bars negligent disclosures and disclosures of information that the employee should know is classified or in the process of a classification determination. The court explained that "[t]he reasonable person standard is one to which people are held in all their activities, and it does not become unconstitutionally vague simply because First Amendment rights are involved" (Mot. to Aff. App. 19a). The court likewise rejected the claim by the *AFGE* plaintiffs that the agreements violate 5 U.S.C. 7211 – which prohibits interference with the right of employees to petition Congress or a Member of Congress or to furnish information to a House, committee or Member of Congress – because the plaintiffs failed to allege that they had disclosed or intended to disclose classified or classifiable information to Congress and been threatened with enforcement of the nondisclosure agreement as a result (Mot. to Aff. App. 21a-22a).[12]

2. On September 29, 1988, the Director of ISOO published regulations setting forth the manner in which he would implement the final judgment in the *NFFE* and *AFGE* cases. 53 Fed.

[12] The *NFFE* and *AFGE* plaintiffs have appealed the final judgment in those cases to the Court of Appeals for the District of Columbia Circuit, Nos. 88-5404 and 88-5402.

Reg. 38,278, amending 32 C.F.R. 2003.20. The regulations clarify all outstanding SF 189 agreements by substituting for the term "classifiable information" a more precise description of the categories of information to which that shorthand label was intended to refer: "unmarked classified information (including oral communications), and unclassified information that meets the standards for classification and is in the process of a classification determination" (32 C.F.R. 2003.20(h)(1)). The new ISOO regulations also state the basis on which an employee may be held liable for an unauthorized disclosure of information covered by SF 189 (or the new SF 312, discussed below)—namely, if he knew or reasonably should have known that the information was classified or in the process of a classification determination (32 C.F.R. 2003.20(h)(3)). On September 26 and 30, 1988, instructions were issued on behalf of the DCI to clarify the existing Form 4193 agreements by substituting similar language for the term "classifiable" and to require appropriate government officials to furnish notification of these changes to employees who had previously signed that Form. Pursuant to a further order entered in *NFFE* and *AFGE* on September 26, 1988, all federal agencies were required by October 27, 1988, to furnish individualized notice of the clarification to employees who had signed SF 189 and Form 4193 (J.A. 64-65).

In addition, effective September 29, 1988, the Director of ISOO replaced SF 189 on a prospective basis with a new SF 312 (J.A. 66-70; 32 C.F.R. 2003.20(a)). SF 312 likewise omits the term "classifiable" and refers instead only to "classified" information (including information that is unmarked) and information that meets the standards for classification and is in the process of a classification determination. Like Form 4355 (see page 10, *supra*), SF 312 provides that if the signatory is uncertain about the classification status of information, he must confirm with an authorized official that the information is unclassified before he may disclose it (J.A. 67). Any person who previously signed an SF 189 is permitted to sign an SF 312 in its place (32 C.F.R. 2003.20(b)).[13]

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[13] As noted above (see pages 9-10, *supra*), the DCI previously had replaced Form 4193 with Form 4355, which also omits the term "classifiable."

3. Because Section 630 was enacted as a rider to an appropriations law for fiscal year 1988, it expired on September 30, 1988. However, Section 619 of the Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1721, contains restrictions on the expenditure of appropriated funds for fiscal year 1989 that are identical to those in Section 630 of the 1988 act.[14]

SUMMARY OF ARGUMENT

I. The President's constitutionally assigned roles as Commander in Chief, sole organ of the Nation in its external relations, and head of the Executive Branch grant him complete authority over matters of national defense and foreign affairs within the Executive Branch. The subordinate personnel who assist him in these responsibilities therefore must be subject to his direction. This constitutional imperative of Presidential control applies to the protection of national security information to which his subordinates have access. Congress has a role to play in the areas of national defense and foreign affairs, by virtue of the need for the Senate to consent to treaties and Congress's powers to declare war, provide an Army and Navy, regulate the land and naval forces, and appropriate funds. But Congress must exercise those powers in a manner that respects the principle of Presidential control over the execution of his own inherent powers and whatever laws Congress may enact. Accordingly, Congress may not vest final decision-making authority in lower-ranking Executive Branch personnel on matters of na-

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[14] When the President signed the 1989 Act, he expressed serious reservations about the constitutionality of Section 619. The President explained that "[o]ur Nation's security depends upon our success in diplomatic, military, and intelligence activities, and that success depends upon our ability to protect the Nation's secrets"; and he stressed that he has the "constitutional responsibility to ensure the secrecy of information whose disclosure would threaten our national security" (24 Weekly Comp. Pres. Docs. 1189 (Sept. 23, 1988)). The President therefore directed that, in accordance with his sworn obligation to preserve, protect, and defend the Constitution (see Art. II, § 1, Cl. 8), Section 619 would be considered to be of no force and effect unless and until this Court reverses the district court's ruling in the instant case holding the identical provisions in Section 630 of the 1988 Act unconstitutional (*ibid.*).

tional defense and foreign affairs, including the disclosure of national security information.

II. Section 630 of the Treasury, Postal Service and General Government Appropriations Act for Fiscal Year 1988 prohibits the use of funds to implement or enforce classified information nondisclosure agreements having five specified features. The principal concern of Congress, reflected in subsection (2), was satisfied when the arguably vague and overbroad reference to "classifiable" information was deleted from all forms in 1988.

Appellants contend that the forms violate subsection (1) of Section 630 because they apply to unmarked information if it is classified or in the process of a classification determination but do not expressly require that the employee know of that status in order to be subject to sanctions. Contrary to appellants' view, Congress may not constitutionally prohibit the President from taking action against an employee who disclosed information he should have known was classified and who failed even to check on its classified status before he did so. The President's constitutional responsibility to assure the fullest protection for national security information requires that he be able to limit access by (or take other action against) an employee whose negligent conduct undermines the trust that had been reposed in him. In any event, subsection (1) should not be construed as presenting this constitutional issue, because it does not bar the requirement in the new forms that an employee confirm the status of information if he is uncertain whether it is classified.

Subsections (3), (4) and (5) of Section 630 concern the furnishing of national security information by Executive Branch employees to Congress. The President's constitutional responsibilities require that he have direct control over access by anyone, including Members of Congress, to such information in the Executive Branch, and the President has uniformly limited access to classified information to persons who have a need to know the particular information, such as a congressional committee having specific jurisdiction over the subject matter. Congress cannot circumvent this limitation and undermine the President's control over national security information by vesting lower-level employees with a "right" to furnish any classified information to

any Member of Congress. As it happens, appellants concede that subsections (3), (4) and (5) do not confer such a right on Executive Branch employees and do not confer a right on Congress to receive classified information. Instead, appellants concede that those subsections simply prohibit nondisclosure forms from imposing a new burden (such as a requirement of prior authorization) on the exercise of whatever preexisting right (if any) employees might have to furnish classified information to Congress or whatever right Congress might have to receive it. Moreover, appellants expressly do not ask this Court to determine the scope of whatever right employees might have in this regard from some other source, such as the First Amendment or 5 U.S.C. 7211, which preserves the right to petition Congress. They do argue, however, that appellees should individually notify all signatories that the nondisclosure forms do not supersede prexisting rights. But Section 630 does not itself require any notice. And since appellants do not ask this Court to decide whether subsections (3), (4) and (5) have been violated, no notice should be ordered as a "remedy" for what would at most be a purely hypothetical statutory violation.

ARGUMENT

I. THE CONSTITUTION VESTS THE PRESIDENT WITH THE PRIMARY RESPONSIBILITY AND POWER TO PROTECT NATIONAL SECURITY INFORMATION WITHIN THE EXECUTIVE BRANCH

The nondisclosure agreements at issue in this case are personal pledges given by individuals who occupy positions in the Executive Branch that they will respect the trust and confidence that have been reposed in them. The President's authority to demand such a promise rests on the fundamental principle that the Constitution vests the President with personal responsibility over all matters within the Executive Branch that bear on national defense and foreign affairs, including the collection and dissemination of national security information. The Constitution does not permit Congress to thwart the President's discharge of that responsibility by insulating lower-level employees from accountability for their negligent failure to maintain the

confidentiality of national secrets or by vesting those employees with unsupervised discretion to disclose classified information to persons who have not been authorized by appropriate Executive Branch officials to receive it.

A. COMPLETE AUTHORITY OVER NATIONAL DEFENSE AND FOREIGN AFFAIRS WITHIN THE EXECUTIVE BRANCH IS VESTED DIRECTLY IN THE PRESIDENT, BY VIRTUE OF HIS STATUS AS COMMANDER IN CHIEF, SOLE ORGAN OF THE NATION IN ITS EXTERNAL RELATIONS, AND HEAD OF THE EXECUTIVE BRANCH

1. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee,* 453 U.S. 280, 307 (1981) (quoting *Aptheker* v. *Secretary of State,* 378 U.S. 500, 509 (1964)). In recognition of this compelling interest, the Constitution expressly assigns to the President a number of responsibilities that are critical to the protection of the Nation's security.

Most importantly, the Constitution provides that the President "shall be Commander in Chief of the Army and Navy of the United States" (Art. II, § 2). Moreover, the President has "the fundamental duty, under Art. II, § 1, of the Constitution, to 'preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means." *United States* v. *United States District Court,* 407 U.S. 297, 310 (1972). In the field of foreign relations, the Constitution provides that the President "shall appoint Ambassadors" with the advice and consent of the Senate (Art. II, § 2, Cl. 2), and "shall receive Ambassadors" from other Nations (Art. II, § 3). The President also has the power to "make Treaties" with the advice and consent of the Senate (Art. II, § 2, Cl. 2), and "he alone negotiates" with other nations (*United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 319 (1936)). These provisions underlie "the generally accepted view that foreign policy [is] the province and responsibility of the Executive" (*Haig* v. *Agee,* 453 U.S. at 293-294). See also *United*

States v. *Pink*, 315 U.S. 203, 228-230 (1942). In addition to these specific grants of power, the President is vested generally with "[t]he executive Power" (Art. II, § 1) and with the correlative duty to "take Care that the Laws be faithfully executed" (Art. II, § 3). "This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982); see also *Myers* v. *United States*, 272 U.S. 52, 117, 151 (1926).

The Framers understood that their reasons for vesting the executive power in the President alone—to create a unitary, vigorous and independent Executive, see *The Federalist No. 68*, at 411-414 (C. Rossiter ed. 1961) (Hamilton); *id. No. 70*, at 423-424, 428-429 (Hamilton); 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 65-67, 71-74, 96-97, 109, 254, 266-267 (rev. ed. 1966)—were of greatest importance and most sharply focused in the areas of national defense and foreign affairs. As Alexander Hamilton explained regarding the President's role as the Commander in Chief: "[T]he power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority," and "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand" (*The Federalist No. 74*, at 447). Similarly, "[a]s Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' " *Curtiss-Wright*, 299 U.S. at 319, quoting 10 Annals of Cong. 613 (1800); *Pink*, 315 U.S. at 222-223. See also *The Federalist No. 75*, at 451-452 (Hamilton).

Although all executive powers pertaining to the national security are vested directly in the President, he cannot, "alone and unaided," perform the myriad and complex tasks involved in their execution (*Myers*, 272 U.S. at 117; *Buckley* v. *Valeo*, 424 U.S. 1, 135-136 (1976)). Congress accordingly has established various departments and agencies to assist him in these

endeavors. However, the officers whom he appoints to head those departments and agencies are his "subordinates" (*ibid.*) and are "subject to his superintendence" (*The Federalist No. 72*, at 436 (Hamilton)), and lower-ranking officers and employees are subject to the President's supervision and control through those principal officers. As a result, in the case of officers and employees of the Department of State, Department of Defense, and the CIA, as well as others who are "appointed to aid the President in the performance of these [constitutional] duties," "their acts are his acts" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803), quoted in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 631 (1935); see also *Myers*, 272 U.S. at 132-134)).

This constitutional imperative of Presidential control was recognized by the First Congress when it established the Department of Foreign Affairs and the Department of War,[15] and has been respected ever since. Section 1 of the Act of July 27, 1789, ch. 4, 1 Stat. 28, provided that the Secretary of Foreign Affairs "shall perform and execute such duties as shall from time to time be enjoined on or entrusted to him by the President of the United States" and "shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct." [16] Congress likewise directed the Secretary of War to follow the President's instructions in "matters respecting military or naval affairs" (Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49-50). Congress has retained to

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[15] See 1 Annals of Cong. 512 (1789) (remarks of Rep. Vining) ("The Departments of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them"), quoted in *Myers*, 272 U.S. at 124-125.

[16] In *Marbury* v. *Madison*, Chief Justice Marshall referred to the Act establishing the Department of Foreign Affairs as an illustration of a case in which the acts of officers appointed by the President "[t]o aid him in the performance of these duties" are "his acts" (5 U.S. (1 Cranch) at 166). The office of the Secretary of Foreign Affairs of course was the subject of the "Decision of 1789," in which Congress recognized that the Constitution requires the Secretary to serve at the pleasure of the President. See *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986); *Humphrey's Executor*, 295 U.S. at 631; *Myers*, 272 U.S. at 111-126.

the present day the language of the 1789 Act that prescribes the duties of the Secretary of State (22 U.S.C. 2656), and it has provided that the Secretary of Defense "is the principal assistant to the President in all matters relating to the Department of Defense" and is "[s]ubject to the direction of the President" in administering its affairs (10 U.S.C. 133(b); see 50 U.S.C. 401). See also 50 U.S.C. 402 (NSC), 403 (CIA).

The principle of Presidential responsibility for the implementation of the defense and foreign relations of the United States is thus firmly embedded in our national experience and our constitutional and statutory framework. In the exercise of this responsibility, it is critical that the President be able to "place in each member of his official family, and his chief executive subordinates, implicit faith" (*Myers*, 272 U.S. at 134). That means, at least as to those chief executive officers engaged in sensitive foreign policy and national security functions, that the President must be able to dismiss them at will (*ibid.*).[17] It also means, we believe, that the President must be able to exact promises from those officers and their subordinates that they will discharge their functions in a manner consistent with the requirements of their offices and positions, and must be able to enforce such promises with appropriate sanctions. For Congress to deny the President this crucial prerogative of executive leadership, no less than to constrain his ability to discharge key executive subordinates, would "make impossible that unity and coordination in executive administration essential to effective action" (*ibid.*).

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[17] In *Humphrey's Executor*, the Court held that its conclusion in *Myers* regarding the President's illimitable power of removal did not apply to members of the Federal Trade Commission; but the Court did not disturb the reasoning of *Myers* as to "purely executive" officers, such as the Secretary of Foreign Affairs, at issue in the Decision of 1789. See 295 U.S. at 631. In *Morrison* v. *Olson*, No. 87-1279 (June 29, 1988), although the Court sustained the statutory provisions that permit the President to remove an Independent Counsel only for "cause," it stressed that "*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." Slip op. 31. Surely, the Secretary of State, the Secretary of Defense, the DCI, and other officers who assist the President in the areas of national defense and foreign relations must fall in that category.

2. To be sure, Congress has a role in the areas of national defense and foreign affairs. As appellants point out (Br. 22-23), the advice and consent of the Senate are required for the making of treaties and appointment of ambassadors (Art. II, § 2, Cl. 2); Congress as a whole is granted the powers to "provide for the common Defence," "declare War," "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces" (Art. I, § 8, Cls. 1, 11-14); and the Executive is retrained by the constitutional limitation that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" (Art. I, § 9, Cl. 7). See also AFL-CIO Br. 12-20; House Br. 18-19, 26. But these powers are conferred on Congress in the same document that confers on the President the status of Commander in Chief and the several powers (concerning the appointment and receiving of ambassadors and the making of treaties) that manifest the President's status as the " 'sole organ of the nation in its external relations' " (*Curtiss-Wright*, 299 U.S. at 319). The Framers therefore plainly intended that Congress would exercise its enumerated powers in a manner that respects the President's unique status and distinct responsibilities under the Constitution.

In particular, Congress must respect the constitutional requirement that the President at all times retain control over the implementation of whatever substantive measures the Constitution authorizes Congress to enact in the area of national defense and foreign relations. Especially in matters touching upon the national security, that is the very essence of "[t]he executive Power" and of the duty to "take Care that the Laws be faithfully executed." Indeed, only by vesting the President with complete authority over the execution of whatever laws Congress may enact could the Framers assure that the shared responsibilities of Congress and the President would be harmonized and that the Nation would speak with one voice to the rest of the world.[18]

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[18] See *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 110 (1948) ("Legislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies.").

The foregoing discussion makes clear, for example, that Congress could not, simply by invoking its power to make appropriations or to "make Rules for the Government and Regulation of the land and naval Forces," enact a rule that effectively deprived the President of his power as Commander in Chief by purporting to vest final and independent decision-making authority on a question of military judgment in a lower-ranking officer who was not subject to his command. Nor could Congress, simply by invoking its power to make appropriations or to establish and define the duties of offices in the Executive Branch (Art. II, § 2), vest an Executive Branch officer other than the President with final and independent authority to determine whether and how discourse should be conducted with another nation. Such legislative impediments to the full assumption of personal authority and responsibility by the President would disarrange the constitutional structure that the Framers deemed necessary to protect the security of the Nation and the freedom of its people (compare *Bowsher* v. *Synar*, 478 U.S. 714, 722, 730 (1986); *INS* v. *Chadha*, 462 U.S. 919, 959 (1983)); would " 'impermissibly threaten[ ] the institutional integrity of the [Executive] Branch' " (*Mistretta* v. *United States*, No. 87-7028 (Jan. 19, 1989), slip op. 22, quoting *CFTC* v. *Schor*, 478 U.S. 833, 851 (1986)); and would, by definition, " 'disrupt[ ] the proper balance between the coordinate branches' [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions" (*Morrison* v. *Olson*, No. 87-1279 (June 29, 1989), slip op. 36, quoting *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977)).[19]

[19] Appellants rely (Br. 27) on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-638 (1952), for the proposition that the President's power is at its "lowest ebb" when he takes action incompatible with the will of Congress. However, *Youngstown* involved an effort by the President to take control of private property, not, as here, the authority of the President to direct the actions of his subordinates within the Executive Branch who assist in the performance of his constitutional duties. Here, unlike in *Youngstown*, the President unquestionably has inherent powers stemming from his role as Commander in Chief and the Nation's representative in foreign affairs. It is the power of Congress, not that of the President, that is at its "lowest ebb" when an Act of Congress would frustrate the President's accomplishment of that role.

B. THE PRESIDENT'S CONSTITUTIONAL AUTHORITY OVER NATIONAL DEFENSE AND FOREIGN RELATIONS REQUIRES THAT HE HAVE CONTROL OVER NATIONAL SECURITY INFORMATION IN THE EXECUTIVE BRANCH

The constitutional imperative of Presidential control applies in full measure to the protection of national security information that Executive Branch employees create or handle in assisting the President in the performance of his duties as Commander in Chief and representative of the Nation in foreign affairs.

1. For reasons "too obvious to call for enlarged discussion" (*CIA* v. *Sims*, 471 U.S. 159, 170 (1985)), secrecy is often essential to the successful conduct of the Nation's defense and foreign relations. This Court has recognized that the success of most negotiations depends upon the assurance that information shared between the President's agents and the representatives of foreign nations will remain confidential. *Curtiss-Wright*, 299 U.S. at 319-321. In addition, the collection of reliable intelligence is critical to the performance of a wide variety of military, diplomatic and similar undertakings related to the national security, and the continued flow of intelligence ordinarily requires that the information itself, as well as the sources and methods used to gather it, be held in the strictest confidence. *CIA* v. *Sims*, 471 U.S. at 169-173. The need for secrecy is also self-evident with respect to information concerning our own military plans, weapons and vulnerabilities, as well as information concerning nuclear facilities. See Exec. Order No. 12,356, §§ 1.3(a)(1), (2) and (7); *New York Times Co.* v. *United States*, 403 U.S. 713, 726-727 (1971) (Brennan, J., concurring); *id.* at 728 (Stewart, J., concurring). For these reasons, the Court repeatedly has acknowledged that the government has a " 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." *Egan*, slip op. 8 (quoting *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980)); see also *United States* v. *Robel*, 389 U.S. 258, 267 (1967); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Totten* v. *United States*, 92 U.S. 105, 106 (1875).

2. Because the substantive responsibility for national defense and foreign relations—including the execution of whatever laws Congress may enact in these areas—is vested directly in the President, he must have direct and unimpeded control over the national security information whose confidentiality he deems necessary to the successful performance of his duties. In fact, the need for secrecy was one of the principal reasons why the Framers vested the responsibility for protecting the national security in the single hand of the President, rather than in a numerous and diffuse legislature. See *The Federalist No. 64*, at 392-393 (Jay) (quoted at page 43, *infra*); *Curtiss-Wright*, 299 U.S. at 321, quoting 1 Richardson, *Messages and Papers of the Presidents* 194 (1896) (" '[t]he necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President' "). As the Court explained in *Curtiss-Wright*, 299 U.S. at 320:

> [H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in times of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

See also *CIA* v. *Sims*, 471 U.S. at 172-173.[20]

The Executive Branch officers and employees who are appointed to assist the President are his agents and serve at his direction in their gathering, retention, and dissemination of information bearing on the national security. Because "their acts are his acts" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) at 166), the President must have the ultimate authority to decide whether any national security information generated or obtained by Executive Branch personnel should remain secret and to decide which other persons (if any) have a need to know it. In

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[20] See also *Chicago & Southern Air Lines*, 333 U.S. at 111 ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world.").

recognition of these principles, the Court recently affirmed in *Egan* that "[the President's] authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant" (slip op. 8). See also *Cafeteria & Restaurant Workers Union, Local 473,* v. *McElroy,* 367 U.S. 886, 890 (1961). Because "[t]he authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief" (*Egan,* slip op. 8), Congress and the courts must respect the measures he determines to be necessary within the Executive Branch to assure the requisite protection for such information.

We do not suggest that Congress has no role to play in regulating national security information. For example, the espionage laws, 18 U.S.C. 798 *et seq.*, and the Intelligence Indentities Protection Act, 50 U.S.C. 421, furnish important protection for such information through the threat of criminal penalties, and the Classified Information Procedures Act (CIPA), 18 U.S.C. App. at 594, establishes procedures for securing classified information in the course of a criminal prosecution. See Appellants' Br. 22, 37; House Br. 21 & n.31. Significantly, however, those statutes defer to the judgment of the Executive Branch regarding the standards to be applied in the classification of information. So, too, does the exemption for national security information under the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(1).[21]

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[21] Contrary to the assertion by appellants (Br. 26) and amici (House Br. 20), our submission in no way calls into question the statutes that provide for the regulation and mandatory disclosure of *non*-classified documents in the possession of the Executive Branch, such as FOIA, 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a, or the Government in the Sunshine Act, 5 U.S.C. 552(b). Appellants rely (Br. 24) on *EPA* v. *Mink,* 410 U.S. 73, 83 (1973), where the Court said of the FOIA national security exemption that "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional

Just as the President's roles as Commander in Chief and representative of the Nation in its foreign relations bar Congress from erecting legislative impediments to his full assumption of personal authority for national security matters (see pages 19-23, *supra*), so too do those roles bar Congress from erecting such impediments to Presidential control over national security information. As Justice Stewart eloquently explained, this result is compelled by both constitutional doctrine and practical necessity:

> The responsibility [for protecting classified information] must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. * * * [I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

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ordering." But *EPA* v. *Mink* does not assist appellants here, because this case involves precisely such limitations on congressional ordering. As we explain below, although Congress has not sought to limit the substantive information that the President may require to be kept secret in the interest of national security, Congress has enacted provisions that, as appellants view them, would impede the President's ability to ensure that such information in fact will be kept confidential and that access to it will be limited to those who have a need to know.

This factor distinguishes the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2107 note, which was at issue in *Nixon* v. *Administrator* and which appellants cite (Br. 26, 34). There, as this Court was careful to point out (433 U.S. at 443-446, 449-451), Congress placed control over the dissemination of documents in the hands of an Executive Branch official and assured an opportunity for assertion by the President of the privilege for confidential communications. Moreover, contrary to appellants' apparent assertion (Br. 26), *Nixon* v. *Administrator* did not involve the application of the Materials Act to national security information.

New York Times Co. v. *United States*, 403 U.S. at 728-730 (Stewart, J., concurring) (footnote omitted). See also *Egan*, slip op. 10; *Cole* v. *Young*, 351 U.S. 536, 546 (1956). Executive Order No. 12,356 and the implementing nondisclosure forms at issue in this case are precisely the sorts of measures to which Justice Stewart referred.

II. SECTION 630 IS UNCONSTITUTIONAL TO THE EXTENT IT IS INTERPRETED TO DEPRIVE THE PRESIDENT OF HIS ABILITY TO PREVENT NEGLIGENT DISCLOSURES OF NATIONAL SECURITY INFORMATION AND TO DEPRIVE THE PRESIDENT OF CONTROL OVER DISSEMINATION OF SUCH INFORMATION, INCLUDING TO MEMBERS OF CONGRESS

After a thorough study within the Executive Branch, the President concluded in 1982 that nondisclosure agreements such as those at issue here perform essential functions in protecting national security information that is classified pursuant to Executive Order 12356. Such agreements serve clearly to define the personal obligations of the officers and employees who will be granted access to national security information, and to assure that each employee fully appreciates the exacting nature of the trust relationship he is assuming with the United States Government and the consequences that may result from a breach of that trust. See *Snepp*, 444 U.S. at 510-511 & nn. 5 and 6, 515; *Webster* v. *Doe*, slip op. 7-8; Webster Decl. ¶ 8 (J.A. 43). For these reasons, NSDD 84 requires all employees who have access to SCI and other classified information to sign a nondisclosure form as a condition of access. Just as this Court held in *Snepp* that such agreements are an "entirely appropriate" way for the DCI to implement his statutory duty to protect intelligence sources and methods from unauthorized disclosure (444 U.S. at 509 n.3), they also are an entirely appropriate way for the President to implement his constitutional duty to protect classified information generally, by setting forth the standards to which Executive Branch employees would be held under Executive Order 12,356 even in the absence of a written agreement. Appellants do not contend otherwise.

Appellants do, however, object to particular features of the forms, arguing that they are (or may be) inconsistent with Sec-

tion 630 of the Treasury, Postal Service and General Government Appropriations Act for fiscal year 1988.[22] Appellants do not seriously dispute that the actions of the DCI and ISOO Director have satisfied Congress's principal concerns in enacting Section 630 (see Br. 19, 32-34)—elimination of the arguably vague and overbroad term "classifiable," which was the subject of subsection (2) of Section 630. But they remain dissatisfied with two other features of the nondisclosure agreements. First, appellants object that the new forms apply to unmarked information if it is classified or in the process of a classification determination, but do not expressly require that the employee *know* of that status in order to be subject to sanctions; appellants believe that this omission violates subsection (1) of Section 630. See Br. 19-20, 34-37. Second, although appellants take the position that subsections (3), (4) and (5) of Section 630 do not confer any *new* right to communicate classified information to Congress, they believe that all signatories of nondisclosure forms should be notified that subsections (3), (4) and (5) prohibit nondisclosure agreements from requiring prior authorization for the exercise of any *preexisting* right to furnish such information to Congress. See Br. 38-48. After briefly addressing the status of the dispute over the term "classifiable," we show that these two objections are unsound as a matter of both statutory construction and constitutional law.

A. THE PRINCIPAL CONCERN THAT LED TO THE ENACTMENT OF SECTION 630 HAS BEEN MET BY THE DELETION OF THE WORD "CLASSIFIABLE" FROM ALL OF THE CHALLENGED AGREEMENTS

All parties and amici agree that Congress enacted Section 630 in response to the use of the term "classifiable" in nondisclosure forms to describe the information that the signatory may not disclose. See pages 7-8, *supra*; Appellants' Br. 5-9; Senate Br. 3, 9-15; House Br. 2-3, 8-9; ACLU Br. 6-9; AFL-CIO/AFGE Br. 9. In 1987, some Executive Branch employees and Members of

[22] As noted above (see page 15, *supra*), the substance of Section 630 was reenacted in Section 619 of the 1989 Act. For convenience, we shall refer only to Section 630.

Congress began to express reservations regarding the use of the term "classifiable" in SF 189 (and Form 4193), because they believed that the term was vague and overbroad and therefore might impermissibly chill the exercise of First Amendment rights, and that the term might allow an agency to classify information after it had been disclosed in order to punish the employee who had disclosed it. It was these concerns that led to the filing of the *NFEE* and *ADGE* suits in August and September 1987, and to the last-minute insertion of Section 630 into the Continuing Appropriations Act for 1988 in December 1987. H.R. Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987); see generally *Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 1-3, 5, 8-17, 22, 42-44, 53-56, 59, 63-64, 76-79, 84, 94-98, 103-110, 112, 116, 122, 133, 148, 151-154 (1987) [*1987 Hearing*].

Because the term "classifiable" was simply a shorthand label for a general concept—information that is not marked as classified but is classified, or information that is not classified but is in the process of a classification determination—the Executive Branch was willing to accommodate the concerns of those who objected to the use of this particular term. These efforts, unfortunately, did not reach fruition before Congress enacted Section 630.[23] After Section 630 was enacted, however, the DCI and Director of ISOO replaced Form 4193 and SF 189 on a prospective basis with Form 4355 and SF 312, which do not contain the word "classifiable." Furthermore, in September 1988, the DCI and Director of ISOO issued general directives that deleted the word "classifiable" from all outstanding Form

[23] As noted above (see note 6, *supra*), the Director of ISOO sought to clarify the meaning of the term "classifiable" in notices published in the *Federal Register* on August 3 and 11, 1987 (see 52 Fed. Reg. 28,802, 29,793 (1987)). Senator Grassley, a leading congressional critic of the term "classifiable" in then-existing forms, had sought to resolve the controversy by proposing a definition identical to that subsequently published by the Director of ISOO on December 21, 1987 (*1987 Hearing* at 10-12, 101; 52 Fed. Reg. 48,367 (1987)), and subsection (1) of Section 630 (which was enacted on December 22, 1987) manifests agreement with that definition (see pages 30-32, *infra*). See also Aff. of Sen. Grassley ¶¶ 5-7 (Nov. 18, 1987) (J.A. 38-39).

4193 and SF 189 agreements and substituted in its place a more precise description of the concept to which that term was intended to apply: (i) information that is marked classified, (ii) information that is unmarked but classified (including oral communications), and (iii) information that meets the standards for classification under a pertinent Executive Order and is in the process of a classification determination. See pages 13-14, *supra*.

The deletion of the term "classifiable" removes any basis for a claim by appellants that outstanding Form 4193 and SF 189 agreements violate subsection (2) of Section 630, and the substitute language ensures that those agreements (like the new Form 4355 and SF 312) are narrowly drawn and will be fully understood by the signatories to apply only to those categories of information that are at the core of the President's constitutional duty to protect the national security. In addition, the three categories of information specified in the revised agreements are the same as those listed in subsection (1) of Section 630. The steps taken by the DCI and Director of ISOO therefore have the effect of bringing the substantive scope of the nondisclosure forms into harmony with Section 630.[24] The

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[24] Appellants complain (Br. 15, 20) that *former* employees who previously signed Form 4193 or SF 189 have not been individually notified of the substitution of more precise language for the term "classifiable." Individualized notice of the substitution was furnished to *current* employees pursuant to the district court's September 26, 1988, order in the companion *NFFE* and *AFGE* cases (J.A. 65), which was based on the First Amendment, not Section 630. The district court in those cases did not extend individualized notification relief to former employees, and the DCI and Director of ISOO did not order federal agencies to furnish such notice because of the administrative burden of tracking down persons who have left those agencies. The same considerations would weigh heavily against ordering individualized notice to former employees under Section 630 in this case.

In any event, subsection (2) of Section 630, upon which appellants rely, says nothing about furnishing individualized notice to anyone, whether a present or former employee. See ACLU Br. 26 n.17. It simply bars the use of appropriated funds to "implement or enforce" a form or agreement that "contains the term 'classifiable.'" By virtue of the deletion of the term "classifiable," no outstanding Form 4193 and SF 189 agreement "contains" that term, and it is clear that appropriated funds are not being used to implement or enforce it. See Senate Br. 14. Individualized notice to former employees would be inappropriate in this case for the additional reasons that:

Senate, House of Representatives and ACLU, appearing as amici curiae, agree that Congress's principal concerns in enacting Section 630 have been satisfied by the deletion of the term "classifiable" from all nondisclosure agreements. Senate Br. 8, 14; House Br. 2-3, 4, 11, 14; ACLU Br. 20, 23-28. See also 135 Cong. Rec. S1161-S1162 (daily ed. Feb. 2, 1989) (statement of Senator Mitchell supporting resolution authorizing filing of Senate's brief in this case).

Appellants' two remaining objections concern subsection (1) of Section 630—because existing nondisclosure agreements do not require actual (subjective) knowledge—and subsections (3), (4) and (5)—because signatories of the nondisclosure agreements have not been individually notified that such agreements do not interfere with any preexisting rights they may have to communicate with Members of Congress about matters involving classified information. The Senate, House of Representatives and ACLU urge the Court not to address these issues, because, in their view, those questions are not ripe for judicial resolution in this case. Senate Br. 15-23; House Br. 12-16; ACLU Br. 28-48. We agree with the amici that the remaining aspects of this case do have a highly abstract and speculative quality. This is in part attributable to the failure by appellants to identify any concrete instance in which an employee disclosed unmarked information that he should have known was classified, or in which an employee disclosed national security information to a Member of Congress without prior authorization.[25]

(i) no individual former (or present) employee was a plaintiff in this case; (ii) the complaint in this case identified appellant AFSA (the only non-congressional plaintiff) as a "professional and labor association of foreign service employees" (J.A. 6) and made no mention of former employees; and (iii) the complaint sought an order directing the DCI and Director of ISOO to notify "all employees" who signed SF 189 or Form 4193 at any time that any provisions inconsistent with Section 630 could not be enforced during fiscal year 1988 (J.A. 10), but it once again made no mention of former employees. Finally, although the complaint sought to require the DCI and Director of ISOO to take certain steps on a government-wide basis, AFSA only has standing to seek relief on behalf of its members (*International Union, United Automobile Workers of America* v. *Brock*, 477 U.S. 274, 281-282 (1986)), who presumably work almost exclusively for the State Department.

[25] In fact, we argued in our motion to affirm (at 21, 27-28) that if the Court does not reject appellants' contentions outright under subsections (1), (3), (4)

In our view, however, the abstract and speculative nature of the remaining aspects of this case is attributable not only to appellants' failure to prove their case, but also to the fact that subsections (1), (3), (4) and (5) of Section 630 did not receive the same focused attention that at least some Members of Congress gave to the use of the term "classifiable" in the nondisclosure forms. Perhaps this accounts for the language in those subsections that, if read expansively, could substantially interfere with the President's constitutional authority to limit dissemination of and access to national security information, without any attempt to take account of competing concerns of the Executive Branch. In fact, the subsections dealing with the furnishing of classified information to Congress appear essentially to be unilateral and sweeping assertions of prerogatives by one political Branch at the expense of the other, rather than a studied legislative response to the sensitive problems involved in the sharing of confidential information between the Branches (such as that embodied in the Classified Information Procedures Act (CIPA), 18 U.S.C. App. at 595).

Like the amici, we do not believe that subsections (1), (3), (4) and (5) of Section 630 should be read to invalidate any provisions of the existing nondisclosure agreements, especially in light of the serious constitutional questions that would be presented by a contrary construction. But we nevertheless have

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and (5), as a matter of either statutory construction or constitutional law, it nevertheless should deny appellants relief because those claims are not ripe or because appellants have failed to establish a basis for equitable relief. This Court has traditionally been reluctant "to decide important questions regarding 'the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case.' " *Kleppe* v. *New Mexico*, 426 U.S. 529, 546 (1976) (quoting *International Longshoremen's Union, Local 37* v. *Boyd*, 347 U.S. 222, 224 (1954)); see also *Public Affairs Assocs., Inc.* v. *Rickover*, 369 U.S. 111, 112-113 (1962). That principle has special force here, because even in the context of a concrete case, the courts have been reluctant to second-guess the factors upon which the responsible Executive Branch official may rely in limiting access to and dissemination of classified information. *Egan*, slip op. 9-11; *Webster* v. *Doe*, slip op. 7-8. Judicial hesitation might also be appropriate because Section 630 purports to be only a temporary legislative restriction on the manner in which federal agencies may spend appropriated funds, not permanent legislation that confers rights directly on private parties. Compare *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 (1979).

substantial concerns about Congress's view—which seems to have animated the enactment of 630—of the scope of its power to intrude upon the President's ability to control national security information within the Executive Branch. We also are concerned that the mere existence of a statute that could be read to insulate employees who make negligent or unauthorized disclosures from any sanctions may undermine the "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp*, 444 U.S. at 509 n.3.

B. SECTION 630 CANNOT CONSTITUTIONALLY BE APPLIED TO DEPRIVE THE PRESIDENT OF HIS AUTHORITY TO PREVENT THE NEGLIGENT RELEASE OF NATIONAL SECURITY INFORMATION BY HIS SUBORDINATES

Subsection (1) of Section 630 provides that appropriated funds may not be used to implement or enforce a nondisclosure policy, form, or agreement that "concerns information other than that specifically marked classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination." Appellants contend (Br. 19-20, 36-37) that appellees are not in compliance with subsection (1) of Section 630 because the nondisclosure forms at issue in this case do not expressly require as a condition of liability that the employee *know* of that protected status.[26] In appellants' view, Congress may constitutionally prohibit the President and other Executive Branch officials from taking *any* action—even limiting further access to national security information—against an employee

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[26] As appellants point out (Br. 35), the nondisclosure agreements must go beyond information that is actually marked classified in order to protect oral communications of national security information, unmarked notes from classified meetings, and as-yet unmarked information that is in the process of a classification determination. See *1987 Hearing* at 63, 78, 99. Appellants are wrong in contending (Br. 35-36), however, that this information is not pro-

who disclosed information that he *should have known* was classified or who negligently failed even to check on its classified status before doing so. We disagree with appellants on both constitutional and statutory grounds.

1. Appellants are clearly wrong in contending that Congress may constitutionally bar the President from providing for the taking of disciplinary action against an Executive Branch employee—or even from denying him further access to classified information—if the employee makes an unauthorized disclosure of national security information that is "only" reckless or negligent, rather than intentional. The former type of disclosure can cause as much harm to the national security as the latter: intelligence sources may dry up, a foreign government whose confidences were betrayed may be offended, or a hostile power may use the information to its advantage. Neither type of security breach can be tolerated, and the Constitution vests the President with the necessary tools to prevent and deter both.

As we have explained above (see pages 24-28, *supra*), the Constitution itself confers on the President the authority to classify and control access to information bearing on the national defense and foreign relations of the United States and to determine whether a person is sufficiently trustworthy to occupy a position in which he will have access to such information. " 'As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities' " (*Egan*, slip op. 11, quoting *United States* v. *Nixon*, 418 U.S. 683, 710 (1974)). Accordingly, neither the courts nor Congress

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tected by Executive Order 12,356 itself simply because it is not marked. The section of the Executive Order that provides for classification of information does not condition that status on the fixing of a marking (see § 1.3(b)), and in fact that section does not refer to markings at all. That subject is addressed by Section 1.5(a), which lists certain information that must be shown on the face of all classified documents or be "clearly associated with other forms of classified information in a manner appropriate to the medium involved." As appellants acknowledge (Br. 35), no marking would be "appropriate" or even feasible in the case of oral communications, but this does not render the substance of those communications ineligible for classified status under Section 1.3 of the Executive Order.

may lightly disable the President from taking measures that he concludes are necessary to protect such information within the Executive Branch, including measures designed to prevent negligent as well as knowing disclosures.

The Constitution imposes on the President the duty to "take Care that the Laws be faithfully executed" (Art. II, § 3). That duty requires the President to exercise the utmost caution and discretion in guarding the Nation's secrets, and to select as his immediate assistants persons in whom he has complete confidence to do the same. Those agency heads in turn must select subordinate officers and employees in whom they have sufficient confidence to warrant entrusting them with classified information. As this Court recently explained, "the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *Egan,* slip op. 10. In fact, *Egan* reiterated the observation in *Cole* v. *Young* that " 'there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the *final say* in deciding whether to repose his trust in an employee who has access to such information' " (slip op. 10 (emphasis added) (quoting 351 U.S. at 546)). See also *Webster* v. *Doe,* slip op. 7 ("the Agency's efficacy, and the Nation's security, depend in large measure on the reliability and trustworthiness of the Agency's employees").

If an employee's negligent disclosure of protected national security information causes the responsible official to lose confidence in the assurance that the employee will not compromise such information in the future, that official must, at a minimum, have the authority to deny the employee further access to classified information. This conclusion follows from the settled Executive Branch practice, approved by this Court, in granting security clearances. It is firmly established that an employee has no "right" to a security clearance. Rather, "[t]he grant of a clearance requires an affirmative act of discretion on the part of the granting official," and "[t]he general standard is that a clearance may be granted only when 'clearly consistent

with the interests of the national security' " (*Egan*, slip op. 9 (quoting Exec. Order No. 10,450, §§ 2 and 7, 3 C.F.R. 936-937, 938 (1949-1953 Comp.)).[27] The responsible official unquestionably could decide that it would not be "clearly consistent" with the national security to grant continued access to an employee who made an unauthorized disclosure of information that he should have known was classified or in the process of a classification determination. See also *Cole* v. *Young*, 351 U.S. at 550 (a "security risk" is present if a person might make an "intentional or inadvertent disclosure of confidential information").[28]

A negligent disclosure of classified information may properly give rise to disciplinary action as well. Even where the right of a superior to remove an officer or employee of the Executive Branch is subject to limitation by Congress, the President's duty to "take Care" requires at a minimum that he be able to remove (or to direct the removal of) a subordinate official for "cause." See *Morrison* v. *Olson*, No. 87-1279 (June 29, 1988), slip op. 33-34. The unauthorized disclosure of national security information that an employee should have known was classified or in

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[27] Congress has employed comparable formulations. See 50 U.S.C. 831, 832(b) (NSA) ("clearly consistent with the national security"), at issue in *Carlucci* v. *Doe*, No. 87-751 (Dec. 6, 1989); 5 U.S.C. 7532 (employee may be removed if "necessary or advisable in the interests of national security"), at issue in *Carlucci* v. *Doe* and *Cole* v. *Young*); 50 U.S.C. 403(c) (DCI may terminate CIA employee if he deems it "necessary or advisable in the interests of the United States"), at issue in *Webster* v. *Doe*.

[28] Appellants point out (Br. 37) that an individual may be held criminally liable for disclosure of the identity of a covert agent only if he knows that the information identifies the agent and the United States is taking steps to conceal the covert relationship. 50 U.S.C. 421(a) and (b). See also 18 U.S.C. 798 (criminal penalties for knowing and willful use or communication of classified material). However, in these statutes, Congress has sought to reinforce, not undermine, the protection for national security information that is afforded by the Executive Branch pursuant to its inherent authority, and a scienter requirement is in any event common in the criminal law. The availability of these criminal penalties in no way displaces or obviates the need for the Executive Branch to retain the inherent authority to deny further access to classified information to employees who make unauthorized disclosures of information that may not be intentional but nevertheless constitute serious breaches of security.

the process of a classification determination would in many circumstances be cause for removal, and would unquestionably be cause for at least some disciplinary action in virtually all cases.

As the Court recognized in *Snepp*, when an individual is granted access to the Nation's most sensitive secrets, he enters into a special fiduciary relationship with the government that entails a high degree of trust. 444 U.S. at 510-511 & n.5; see also *Webster* v. *Doe*, slip op. 7-8; *United States* v. *Marchetti*, 466 F.2d 1309, 1313 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). It is self-evident that such an employee may properly be held to an exacting degree of care in handling the secrets with which he is entrusted. Moreover, before an individual is granted access to classified information, he is briefed on the provisions of the current Executive Order on classification, pertinent regulations concerning handling, storage and protection of classified information, and his responsibilities and liabilities with respect to that information.[29] It therefore is manifestly fair, as well as important to the national security, that a person be held accountable for the unauthorized disclosure of information that he reasonably should know is classified or in the process of a classification determination.[30] If the employee has any doubt about whether particular information may be disclosed, he must err on the side of nondisclosure and inquire about the classified status of the information. Compare *Snepp*, 444 U.S. at 512.

Nor have appellants offered any compelling justification for an Act of Congress that would override the President's constitutional authority to impose this duty of care on Executive Branch employees who have access to national security information.

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[29] In fact, when employees signed the agreements that appellants challenge in this case, they expressly acknowledged that they received this indoctrination, that they were advised that the unauthorized disclosure or negligent handling of classified information could cause irreparable injury to the United States and could be used to the advantage of a foreign nation, and that breach of the agreement could lead to loss of a security clearance or employment (J.A. 15-16, 19, 21, 54-55, 56, 66-67).

[30] The district court observed in the *NFFE* and *AFGE* cases that "[t]he reasonable person standard is one to which people are held in all their activities, and it does not become unconstitutionally vague simply because First Amendment rights are involved" (Mot. to Aff. App. 19a).

Surely it is not justified by the First Amendment. This Court and other courts have already sustained various limitations on expression in the context of the fiduciary relationship involving access to classified information (*Snepp*, 444 U.S. at 509 n.3; *United States* v. *Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); *McGehee* v. *Casey*, 718 F.2d 1137 (D.C. Cir. 1983)), as well as military command (*Brown* v. *Glines*, 444 U.S. 348, 354 (1980); *Parker* v. *Levy*, 417 U.S. 733, 759 (1974)). "Even when not confronted with the special requirements of the military, [the Court] ha[s] held that a governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government." *Brown* v. *Glines*, 444 U.S. at 356 n.13; see *Rankin* v. *McPherson*, No. 85-2068 (June 24, 1987), slip op. 5, 10; *Connick* v. *Myers*, 461 U.S. 138, 140 (1983); *CSC* v. *Letter Carriers*, 413 U.S. 548, 565 (1973).

2. For the foregoing reasons, Congress may not constitutionally prohibit the President from denying further access to classified information to (or taking other appropriate action against) an employee who negligently disclosed information that he should have known was classified and who failed to inquire about its classified status before he did so. However, we do not believe that Congress took that extreme step when it enacted subsection (1) of Section 630.[31] To the contrary, like the Senate (Senate Br. 16-18), we believe that the nondisclosure forms adopted by the DCI and Director of ISOO are fully consistent with subsection (1).

Form 4355 states that an employee may not disclose information that he knows to be classified or in the process of a classification determination, and it imposes on the employee a duty to consult with appropriate management authorities in order to ensure that he knows whether information he has reason to believe is SCI is in fact regarded by the agency to be

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[31] Amicus AFGE, which was a plaintiff in one of the companion cases below, expresses a similar view, stating that "it is far from clear that § 630 is intended to preclude the Executive from taking disciplinary action against an employee who unknowingly but carelessly discloses unmarked information in the process of a classification determination" (AFL-CIO/AFGE Br. 25-26).

SCI (J.A. 55). SF 312 provides that the signatory will not disclose classified information (including that which is unmarked or in the process of a classification determination) without proper authorization, and it imposes a duty on the signatory, if he is uncertain about the classification status of the information, to confirm that the information is unclassified before disclosing it (J.A. 66-67).

The Senate takes the position that the duty to inquire imposed by Form 4355 and SF 312 does not conflict with subsection (1) of Section 630. The Senate argues (Br. 17-18) that "[n]either the purpose of section 630 nor the text of subsection (1) suggests that Congress intended to deny to the executive the power to require employees to take reasonable steps to learn whether information is classified or is undergoing a classification review, as long as they are not required to speculate about the actions of government classifiers." We agree. If the employee abides by this distinct duty to inquire, he will know prior to any occasion for disclosure whether a particular item of unmarked information is either classified or in the process of a classification determination, and subsection (1) therefore will not be implicated. Moreover, the employee's inquiry presumably will produce a clear answer about the current status of the information, which was the concern that led Congress to enact the related prohibition against use of the term "classifiable." See pages 29-30, *supra*. Appellants do not in any event challenge the duty-to-inquire feature of Form 4355 and SF 312, and subsection (1) should be construed to authorize that feature in order to avoid the serious constitutional question that would be presented if the President were barred from insisting that employees who have access to national security information take at least that precaution.

Appellants do object in passing (See Br. 15, 20) to the statement in the regulations published by the Director of ISOO on September 29, 1988, that a person who has signed an SF 189 or 312 "may be liable for disclosing 'classified information' only if he or she knows or reasonably should know" that unmarked information is classified or meets the standards for classification and is in the process of a classification determination. 32 C.F.R. 2003.20(h)(3), as added, 53 Fed. Reg. 38,279 (Sept. 29, 1988).

However, appellants' complaint in district court challenged only the nondisclosure *forms* (J.A. 8-10), and the validity of the cited ISOO regulation therefore is not properly before the court. See ACLU Br. 34-35 & n.26.[32] Moreover, questions concerning the meaning and validity of ISOO's standard-of-care regulation should await a concrete factual context in which the regulation is actually applied. See note 25, *supra*.[33]

C. SECTION 630 CANNOT CONSTITUTIONALLY BE APPLIED TO DIVEST THE PRESIDENT OF ALL CONTROL OVER THE DECISION WHETHER TO DISCLOSE NATIONAL SECURITY INFORMATION TO CONGRESS

As relevant here, the remaining provisions of Section 630 concern the furnishing of national security information by Executive Branch personnel to Congress. Subsection (3) provides that appropriated funds may not be used to implement a nondisclosure agreement that "directly or indirectly obstructs, by requirement of prior written authorization * * * or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;" subsection (4) bars any agreement that "interferes with the right of Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of Congress;" and subsection (5) prohibits any agreement that "imposes any obligations or invokes any remedies inconsistent with statutory law."

The language of these provisions bespeaks an inclination on the part of Congress to seek broad access to national security information in the Executive Branch by removing decisionmaking about congressional access from the usual channels in

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[32] Neither of the ISOO forms at issue here, SF 189 and SF 312, addresses the question of the standard of care; that is left to the cited ISOO regulation. Form 4193, which was superseded by the DCI in March 1988, likewise did not address the standard-of-care question.

[33] As the Senate points out (Br. 17), in the case of an employee who signed SF 312, the "reasonably should know" standard in the ISOO regulation would presumably be applied in tandem with the duty to inquire under SF 312, thereby perhaps ameliorating any problems that might be raised under subsection (1) of Section 630 by the regulation standing alone.

the Executive Branch and allowing lower-ranking employees to decide for themselves whether to divulge such information to Congress or its Members. If Section 630 actually enacted such a reordering into law, it clearly would be unconstitutional. As it happens, all parties agree that subsections (3), (4) and (5) do not confer such a right on Executive Branch personnel. See pages 48-50, *infra*. Nevertheless, the implications of such a statute furnish a useful backdrop for consideration of the remaining objection advanced by appellants.

1. We have explained above that the President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch. There is no exception to this principle for those disseminations that would be made to Congress or its Members. In that context, as in all others, the decision whether to grant access to the information must be made by someone who is acting in an official capacity on behalf of the President and who is ultimately responsible, perhaps through intermediaries, *to* the President. The Constitution does not permit Congress to circumvent these orderly procedures and chain of command—and to erect an obstacle to the President's exercise of all executive powers relating to the Nation's security—by vesting lower-level employees in the Executive Branch with a supposed "right" to disclose national security information to Members of Congress (or anyone else) without the authorization of Executive Branch personnel who derive their authority from the President. Such a law would squarely conflict with the Framers' considered judgment, embodied in the Commander-in-Chief and related Clauses of Article II, that all power in matters of national defense and foreign affairs in the Executive Branch must be vested in a *single* hand.[34]

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[34] By giving Congress free access to information at the core of the Executive's functions, such a law also would constitute precisely the sort of congressional "encroachment and aggrandizement that has animated [the Court's] separation-of-powers jurisprudence and aroused [the Court's] vigilance against the 'hydraulic pressure inherent within each of the separate Branches

Presidents have on numerous occasions exercised their authority over national security information as against requests by Congress for access to it. In fact, it has been recognized since the adoption of the Constitution that intelligence and other secret information obtained by the Executive Branch in the performance of its responsibilities in the areas of defense and foreign relations may properly be withheld from Congress, in order to provide the firmest assurance of confidentiality. As John Jay explained in *The Federalist No. 64*, at 392-393:

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where, the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

See also *id. No. 75*, as 452 (Hamilton). Consistent with this view, President Washington, less than ten years later, refused to accede to the request by the House of Representatives for the instructions, correspondence, and documents relating to the negotiation of the Jay Treaty—"a refusal the wisdom of which was recognized by the House itself and has never since been

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to exceed the outer limits of its power.' " *Mistretta*, slip op. 20-21 (quoting *INS* v. *Chadha*, 462 U.S. 919, 951 (1983)). Especially in these circumstances, appellants err in suggesting (Br. 20-21) that the Court should apply a balancing test derived from *Nixon* v. *Administrator*, 433 U.S. at 441, 443, in assessing the constitutionality of the statute.

doubted." *Curtiss-Wright*, 299 U.S. at 320. See 1 Richardson, *Messages and Papers of the President* 194 (1896).[35]

Later, when Jefferson was President, he declined to furnish certain material about the Burr conspiracy in response to a House resolution that itself contemplated that the President could withhold such information "as he may deem the public welfare to require not to be disclosed" (16 Annals of Cong. 336 (1807)). From that time to the present day, information has been withheld on numerous occasions by most of our Presidents, on the ground that disclosure would not be consistent with the public interest.[36] Relying on many of these precedents, Attorney General (later Justice) Jackson, with the approval and at the direction of the President, declined to comply with a request by the House Committee on Naval Affairs for FBI records concerning labor disputes and subversive activities at industrial establishments having naval contracts. 40 Op. Att'y Gen. 45 (1941). He explained that "the results of counterespionage activities and intelligence activities of [the

[35] The groundwork for this refusal had actually been established four years earlier, when President Washington received a request for documents by the House committee investigating the St. Clair expedition. President Washington had assembled the Cabinet on that occasion because he was concerned "that so far as it should become a precedent, it should be rightly conducted." 1 *The Writings of Thomas Jefferson* 303 (A. Lipscomb ed. 1903). Jefferson reported that Washington "could readily conceive there might be papers of so secret a nature, as that they ought not to be given up" (*ibid.*), and the Cabinet subsequently endorsed the view that the President "ought to refuse those [papers], the disclosure of which would injure the public" (*id.* at 304), although the President elected to furnish the particular documents at issue (*id.* at 305). This and other withholdings of information from Congress by the President are compiled in Office of Legal Counsel, "Memorandum for the Attorney General Re: History of Presidential Invocations of Executive Privilege Vis A Vis the Congress" (Dec. 14, 1982), *reprinted in* H.R. Rep. No. 968, 98th Cong., 2d Sess. 90-117 (1982) [hereinafter *OLC Memorandum*].

[36] The *OLC Memorandum* cited in note 35, *supra*, discusses withholdings of documents by Presidents Jackson (H.R. Rep. No. 968, *supra*, at 95-97), Tyler (*id.* at 97-100), Polk (*id.* at 100-103), Buchanan (*id.* at 103), Lincoln (*id.* at 103-104), Andrew Johnson (*id.* at 104), Grant (*id.* at 104-105), Cleveland (*id.* at 105-106), Harrison (*id.* at 105), McKinley (*id.* at 106), Theodore Roosevelt (*id.* at 106), and their successors (*id.* at 107-117).

Justice] Department involving those elements are kept within the fewest possible hands" and "cannot be too closely guarded," because the information would be "of inestimable service to foreign agencies" (*id.* at 46).

History thus confirms that the Executive Branch may properly decline to grant Members of Congress access to national security information and that the decision whether to do so must be made by the President or by another Executive Branch official who is accountable to him.[37] This arrangement parallels the decision regarding the assertion of the state secrets privilege in court, which must be "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953) (footnote omitted); compare *United States* v. *Nixon*, 418 U.S. 68[illegible] *ed States* v. *AT & T*, 567 F.2d 121, 1[illegible] ;ress cannot undermine this consti[illegible] ...g., conferring a right on an Executive Branch employee to furnish a Member of Congress with information on treaty negotiations that the President has decided should be withheld.

This is not to say, of course, that there should be an inflexible rule calling for the routine withholding of all classified information from all Members of Congress. To the contrary, the sharing of confidential information in appropriate circumstances has been—and will continue to be—a proper subject of accommodation between the political Branches. But in light of the extreme sensitivity of the information concerned, both the Executive Branch and Congress have recognized that such communications must be conducted through the secure channels established by the Branches working in cooperation. One concrete example of this approach is the extensive cooperation between the relevant congressional committees, including the Select Committees on Intelligence in both Houses, and the Executive Branch agencies for which those committees have over-

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[37] Compare Art. II, § 3 (the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient").

sight responsibility. We have been informed by the CIA that it provided 66 classified briefings to Members of Congress and 711 classified briefings for congressional staff in 1988, and 111 classified briefings for Members and 738 classified briefings for staff in 1987. Similarly, the National Security Agency made more than 175 classified briefings and submissions to committee members and staff in 1988. These briefings, which were conducted through the official channels maintained by the congressional affairs office of each agency, were in addition to formal testimony and various required reports, such as those submitted pursuant to 50 U.S.C. 413.

This approach of furnishing information through established agency channels to the relevant committees is faithful to one of the fundamental principles of the President's program for assuring the fullest possible protection for national security information—namely, that a person may be granted access to a particular item of classified information only if he has a "need to know" that information for furtherance of official functions. The need-to-know principle is set forth in Executive Order 12,356 itself—the instrument through which the President maintains his authority over classified information within the Executive Branch—which provides that access may be granted only where it "is essential to the accomplishment of lawful and authorized Government purposes" (§ 4.1(a)). This restriction serves to keep the information in the fewest possible hands, consistent with the performance of official business, and thereby maximizes the opportunity for control, accountability, and protection against compromise. The need-to-know restriction applies throughout the Executive Branch, even to Cabinet Secretaries. There is no reason why it should not apply to Members of Congress as well. This important limitation is preserved when national security information is furnished through official agency channels to a relatively few Members of Congress who serve on a committee that has been designated by that House to be responsible for a particular jurisdiction in the area of defense, foreign affairs or intelligence. Congress in fact acted on this view when it provided by statute for the furnishing of reports and information on intelligence matters through official channels to the Intelligence Committee of each House. 50 U.S.C. 413. By contrast, if all lower-ranking Executive Branch personnel were free to furnish national security

information directly to any of 535 individual Members of Congress, the principle of limited and focused access based on a demonstrated need to know would be obliterated—and with it the safeguards of control and accountability. No system of information security could be effective if each individual having access to classified information could determine for himself what information may be disclosed, to whom, and when.[38] Cf. *Snepp*, 444 U.S. at 512 ("When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful.").[39]

The difficulties with such a regime would be exacerbated by the distinct institutional nature of a legislative body, which is comprised of numerous and largely autonomous members who (unlike Executive Branch personnel) are not personally accountable to any single officer. These institutional considerations may create additional problems in maintaining confidentiality within the Legislative Branch.[40]

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[38] For this reason, the House (Br. 14) and Senate (Br. 19) are wrong to the extent they suggest that because Members of Congress may have been granted access to particular classified information on particular occasions, the language in the nondisclosure agreements that permits disclosures to persons who are "authorized" to receive it (J.A. 15, 19-20, 55, 67) would permit Executive Branch employees to disclose *any* classified information to *any* Member of Congress at *any* time. The Director of ISOO has explained that although the status of Members of Congress as elected representatives is deemed to establish their general trustworthiness to have access to classified information, particular disclosures to Members of Congress are limited by the uniformly applicable need-to-know principle. See ISOO, *Classified Information Nondisclosure Agreement (Standard Form 312): Briefing Booklet* 50 (1988). The term "authorized" in the nondisclosure forms embodies this critical limitation.

[39] Ironically, the House Permanent Select Committee on Intelligence has recognized the importance of the need-to-know principle and has recommended that adherence to that principle be strengthened. See H.R. Rep. No. 5, 100th Cong., 1st Sess. 11 (1987).

[40] See S. Rep. No. 522, 99th Cong., 2d Sess. 90-95 (1986) (discussing targeting of congressional staff by hostile intelligence services and recommending centralized security procedures within the Senate). A recent report of the House Intelligence Committee stated that "[o]ther than the intelligence committees of the House and the Senate, the Congress has no personnel, physical, document and communications security programs which meet or exceed all applicable executive branch security standards." H.R. Rep. No. 5,

2. For the foregoing reasons, it is clear that the Constitution would not permit Congress to divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a "right" to furnish such information to a Member of Congress without receiving official authorization to do so. As it happens, however, appellants concede (Br. 17-18, 30, 38-39, 44-45) that subsection (3) of Section 630 does *not* confer such a right on Executive Branch employees and that subsection (4) does *not* confer a right on Congress to receive national security information. Instead, appellants concede, those subsections simply prohibit the nondisclosure agreements utilized by Executive agencies from imposing any new burden (such as a requirement of prior approval) upon the exercise of whatever preexisting right (if any) those employees might have (*e.g.*, under the First Amemdment or any statutes incorporated by subsection (5) of Section 630, such as 5 U.S.C. 7211) to furnish classified information to Congress or of whatever preexisting right Congress might have to receive it. We agree, for the reasons given by appellants (see Br. 38-40), that subsections (3), (4) and (5) confer no new substantive rights on Executive Branch personnel or Congress, and so do amici ACLU (Br. 42-43) and AFL-CIO/AFGE (Br. 10-11, 12, 26).[41]

In any event, no claim under subsection (4) of Section 630 is properly before the Court, because appellant AFSA and its

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supra, at 3. See also S. Rep. No. 522, 99th Cong., 2d Sess. 92-94 (1987). In response to these concerns, but ten months after Section 630 was enacted, the Senate adopted a Security Manual in October 1988. However, the House has not adopted a similar manual, and the Senate's Manual does not apply to individual Members.

Quite aside from the risk of disclosures from within the Legislative Branch that are not authorized by Congress itself, the President may have no practical control over whether Congress or its Houses and committees will formally release national security information that the President believes should remain confidential. For example, the rules of the Senate Intelligence Committee purport to reserve to that committee the right to decide for itself whether classified information should be disclosed, even over the objections of the President, if the full Senate agrees. See S. Res. 400, § 8, 94th Cong., 2d Sess. (1976). See also Rule XLVIII, Rules of the House of Representatives, § 7.

[41] The Senate apparently concurs in this interpretation as well (se Senate Br. 21 ("[t]he objective of subsection 3 is to protect rights that are established or recognized under [5 U.S.C.] 7211")).

members do not have standing to raise a claim concerning the "right" of Congress to receive information, and individual Members of Congress do not have standing to vindicate the rights of Congress or either of its Houses (see J.S. App. 13a-14a). Moreover, as the district court recognized (J.S. App. 26a), the requirement that Executive Branch personnel obtain prior approval before disclosing classified information to Congress does not interfere with any "right" of Congress to receive information from the Executive Branch. Any right of Congress in this regard must ultimately be vindicated through official channels, such as by the issuance of a subpoena, which will trigger a response from the agency head or other authorized official. Cf. *Touhy* v. *Ragen*, 340 U.S. 462 (1951).[42]

Insofar as subsection (3) is concerned, appellants represent (Br. 45) that they are not asking the Court to pass on the extent of what "right" employees might enjoy from *other* sources—such as the First Amendment or statutes preserved by subsection (5)—to furnish national security information to Congress.[43] The only relief they seek is an order requiring the

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[42] Amici AFL-CIO and AFGE are wrong in contending (Br. 25) that this case presents a clash between the assertion of an "implicit" right of the President and Congress's enumerated powers. Subsections (3), (4) and (5) of Section 630 must be based on Congress's power to investigate activities in the Executive Branch. But that power, which is nowhere expressed in the Constitution, is *implied* from Congress's power to make laws. See, *e.g.*, *Watkins* v. *United States*, 354 U.S. 178, 197 (1957); *McGrain* v. *Daugherty*, 273 U.S. 135, 178 (1927). As an ancillary power, it extends only so far as necessary to serve Congress's lawmaking function. By contrast, as this Court has recognized, plenary control over the disclosure of national security information is an integral component of the President's role as Commander in Chief and sole organ of the Nation in foreign affairs. Congress's implied power of investigation does not override these constitutional grants of power to the President.

Section 630 purports to be a limit on the use of appropriations, but Congress cannot accomplish by an appropriations measure what would be unconstitutional if enacted as a substantive law. See *United States* v. *Lovett*, 328 U.S. 303 (1946); Henkin, *Foreign Affairs and the Constitution* 113 (1972) ("Even when Congress is free not to appropriate, it ought not be able to regulate Presidential action by conditions on the appropriation of funds to carry it out, if it could not regulate the action directly."); *id.* at 115 ("Congress cannot impose conditions which invade Presidential prerogatives to which the spending is at most incidental"). Cf. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

[43] It is clear, however, that the First Amendment right to petition the government for redress of grievances confers no right to divulge national

appellee federal officials to notify all persons who have signed the nondisclosure agreement forms that no requirement of prior authorization can be applied to communications with Congress where the signatory has a preexisting right from another source to furnish the information to Congress or Congress has a preexisting right to receive it. See Appellants' Br. 18, 30, 38, 45, 48. But subsection (3) says nothing about furnishing notice (see ACLU Br. 26, n.17); it only bars implementation or enforcement of nondisclosure forms that interfere with whatever "right" employees might have to furnish information to Congress. And because appellants do not ask this Court to decide whether the appellee federal officials have violated such a right, there is no basis for the Court to order notice as a "remedy" for what would be at most a hypothetical statutory violation.

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security information. See pages38-39, *supra*; cf. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984); *Touhy* v. *Ragen*, 340 U.S. 462 (1951); *Connick* v. *Myers*, 461 U.S. 138 (1983). The statutory provision upon which appellants principally rely (Br. 40-41, 46), 5 U.S.C. 7211, also refers to a "right" (presumably derived from a source outside Section 7211 itself) to petition or furnish information to Congress, and this Court has indicated that Section 7211 was enacted to secure First Amendment rights (see *Bush* v. *Lucas*, 462 U.S. 367, 382-384 (1983)). It therefore likewise does not confer a right to furnish national security information to Congress.

Appellants also cite (Br. 40) the "whistleblower" protections in the Civil Service Reform Act of 1978, 5 U.S.C. 2302(b)(8). But those provisions—which in any event are enforceable only by the Special Counsel of the Merit Systems Protection Board (5 U.S.C. 1206(c)(1)(A)), not by a suit in the district court (J.S. App. 30a-31a)—do not protect disclosures of classified information even in the course of reporting waste, fraud and abuse in government. See 5 U.S.C. 2302(b)(8)(A). Rather, by not including the exception for classified information in subsection 2302(b)(8)(B), which provides for disclosures to Inspectors General or the Office of Special Counsel of the Merit Systems Protection Board, Congress evidenced an intent to limit disclosures of classified information to particular Executive Branch officials with a designated need-to-know. Although Congress also stated in the whistleblower statute that "[t]his subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress" (5 U.S.C. 2302(b), that provision does not confer an affirmative right to make such disclosures.

Finally, appellants cite (Br. 41, 46) the military whistleblower statute, 10 U.S.C. 1034, as amended by Pub. L. No. 100-456, § 846, 102 Stat. 2027. However that statute applies only to members of the armed services, and therefore would not apply to the civilian foreign service employees who are members of appellant AFSA. Moreover, as amended, Section 1034 is enforced through internal Defense Department procedures.

CONCLUSION

The judgment of the district court sustaining the validity of the nondisclosure forms and denying appellants equitable relief should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article II of the United States Constitution provides in relevant part:

> SECTION 1. The executive Power shall be vested in a President of the United States of America. * * *
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> * * * * *
>
> [Clause 7]. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."
>
> SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *
>
> [Clause 2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *
>
> * * * * *
>
> SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient, * * * he shall receive Ambassasors and other public Ministers; he shall take Care that the Laws be faithfully executed, * * *.

2. Section 630 of Treasury Postal Service and General Appropriations Act, 1988, 101 Stat. 1329-432,[1] provides:

> No funds appropriated in this resolution or any other Act for fiscal year 1988 may be used to implement or enforce

[1] The Treasury, Postal Service and General Appropriations Act, 1988, was enacted by Section 101(m) of the Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-390.